

Cite as 2010 Ark. App. 682

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA10-129

RIVER VALLEY HOMES, INC.
APPELLANT

V.

FREELAND-KAUFFMAN & FREDEEN,
INC.
APPELLEE**Opinion Delivered** October 20, 2010APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CV-2007-1604-3]

HONORABLE JAY T. FINCH, JUDGE

APPEAL DISMISSED

JOHN MAUZY PITTMAN, Judge

River Valley Homes, Inc. (River Valley), brings this appeal from an amended judgment of the Benton County Circuit Court dismissing its complaint with prejudice. We must dismiss the appeal because it is untimely and we therefore lack jurisdiction to hear the appeal.

River Valley originally sued appellee Freeland-Kauffman & Fredeen, Inc. (FKF) and McClelland & Sons, Inc. (McClelland) in August 2007 for breach of contract, negligence, conversion, and fraud in a dispute over the development of a subdivision. River Valley and McClelland settled their dispute through mediation, and McClelland was dismissed from the case. River Valley's claims against FKF remained.

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In a pretrial hearing, River Valley orally moved to dismiss its tort claims against FKF. However, no order was entered dismissing those claims. The case proceeded to a jury trial on River Valley's breach-of-contract claim. When River Valley rested, FKF moved for a directed verdict, which the circuit court granted, dismissing River Valley's amended complaint in a judgment entered on December 12, 2008. This judgment also awarded FKF approximately \$21,000 in costs because River Valley had rejected FKF's Ark. R. Civ. P. 68 offer of judgment.

River Valley filed a timely notice of appeal from the judgment. On August 25, 2009, River Valley filed a motion in this court seeking to remand the case to the circuit court for entry of a final order. We denied the motion for remand and instead dismissed the appeal for lack of a final order on September 16, 2009.

Following the dismissal of the earlier appeal, River Valley requested a trial on its tort claims. FKF responded with a September 25, 2009, letter to the circuit court arguing that the tort claims were barred by the doctrine of res judicata. The letter also served as a cover letter transmitting a proposed amended judgment dismissing River Valley's tort claims on res judicata grounds. The circuit court signed the amended judgment on September 28, 2009, and it was entered on September 29, 2009. River Valley sent a letter to the circuit court on October 6, 2009, in response to FKF's September 25, 2009, letter. River Valley argued that it did not understand why its tort claims would be barred by res judicata and stated that it looked forward to presenting those claims to a jury.

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On November 16, 2009, River Valley filed a motion in the circuit court seeking to extend the time to file a notice of appeal. The motion, which did not cite any authority, asserted that River Valley did not receive a copy of the judgment, that the time to appeal had expired, that the Rules of Civil Procedure authorize an extension of time in such circumstance of up to thirty days, that no prejudice would result to FKF, and that the court's own records indicate that a copy of the judgment was never sent to River Valley.

By order entered on November 17, 2009, the circuit court granted the motion and extended the time for River Valley to file its notice of appeal until December 17, 2009. The court found that River Valley did not receive a copy of the judgment, that the judgment was entered within the last six months, and that no prejudice would result to FKF. River Valley filed its notice of appeal on December 2, 2009.

The timely filing of the notice of appeal and record is a threshold jurisdictional prerequisite for this court. *Sloan v. Arkansas Rural Med. Practice Loan & Scholarship Bd.*, 369 Ark. 442, 255 S.W.3d 834 (2007). Rule 4(a) of the Arkansas Rules of Appellate Procedure—Civil states in relevant part that “a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from.” Ark. R. App. P.—Civ. 4(a). Rule 4(b)(3) provides an exception as follows:

(3) Upon a showing of failure to receive notice of the judgment, decree, or order from which appeal is sought, a showing of diligence by counsel, and a determination that no party would be prejudiced, the circuit court shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of fourteen (14) days from the date of entry of the extension order. Notice of any such motion shall be given to all other parties in

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accordance with Rule 5 of the Arkansas Rules of Civil Procedure. Expiration of the 180-day period specified in this paragraph does not limit the circuit court's power to act pursuant to Rule 60 of Arkansas Rules of Civil Procedure.

The problem in this case arises because, although River Valley filed its notice of appeal within the time granted by the circuit court, the court could only extend the time for fourteen days from the entry of the order extending the time, and River Valley filed its notice on the fifteenth day. It is clear from the use of the "shall" language in Rule 4(b)(3) that the circuit court has limited discretion in extending the time for filing a notice of appeal. See *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004). The general rule is that a judgment or order entered in excess of the court's power is void. *Republican Party of Ark. v. Kilgore*, 350 Ark. 540, 98 S.W.3d 798 (2002); *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (1995); *Ivy v. Office of Child Support Enforcement*, 99 Ark. App. 341, 260 S.W.3d 328 (2007).

Also, our supreme court has consistently held that in order to avail oneself of relief under Rule 4(b)(3), the party who did not receive notice of the entry of an order must act with diligence in keeping up with the case status. See *Tissing v. Arkansas Dep't of Human Servs.*, 2009 Ark. 166, 303 S.W.3d 446; *Sloan, supra*; *Arkco Corp., supra*; *Arnold v. Camden News Publishing Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003).

In *Sloan*, the supreme court held that the Sloans failed to act diligently in keeping up with the status of their case and, thus, it was error for the trial court to grant the motion for extension of time to file the notice of appeal. The judgment in *Sloan* was entered on June 23, 2006. The motion to extend the time asserted that the circuit clerk's office "failed to

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disseminate the order” to the parties and attorneys until September 7, 2006. 369 Ark. at 444, 255 S.W.3d at 836. The supreme court held that “[t]his bare allegation is the only evidence *in the record* used to assert grounds for an extension under Rule 4(b)(3). This conclusion and self-serving allegation falls far short of establishing the diligence required of the Sloans and their attorneys so they may acquire any help or benefit from Rule 4(b)(3).” 369 Ark. at 445, 255 S.W.3d at 836 (emphasis in original). The supreme court held that it was without jurisdiction and dismissed the appeal.

In the present case, River Valley’s motion for extension of time fails to allege that River Valley was diligent in ascertaining the status of its case. The supreme court in *Tissing, supra*, emphasized this requirement of the rule. 2009 Ark. 166, at 7, 303 S.W.3d at 449. Moreover, FKF’s September 25, 2009, letter to the circuit court clearly stated that it was transmitting a proposed amended judgment for the court’s consideration. This put River Valley on inquiry notice where counsel was aware that a precedent had been submitted to the court. *Arnold, supra*. River Valley’s motion contained only “bare allegations” and was likewise insufficient to establish diligence on the part of River Valley and counsel. Although the motion asserts that the circuit court’s own records indicate that a copy of the amended judgment was never sent to River Valley’s attorney, the motion does not elaborate on how the records establish that River Valley failed to receive a copy of the judgment.

Although *Sloan, Arkco Corp.*, and *Arnold* each involved an appellee’s motion to dismiss the appeal and there has not been a motion to dismiss the present appeal, this is a matter that

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goes to our jurisdiction and must be raised by this court if not raised by the parties. *James v. Williams*, 372 Ark. 82, 270 S.W.3d 855 (2008).

Appeal dismissed.

GLADWIN and KINARD, JJ., agree.